Responses to Questions Regarding the Legal Limitations on Restoration and Recovery under the Forest Practice Act

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Question 1: Does the Forest Practice Act authorize the Board of Forestry to adopt regulations for the "restoration" of resources other than the productivity of timberlands?

No. The Z'berg-Nejedly Forest Practice Act of 1973 ("FPA") does not contain a provision authorizing the adoption of regulations for the "restoration" of resources other than the productivity of timberlands. As will be explained in detail, no statute authorizes the imposition of restoration or recovery measures as a condition of timber harvesting plan ("THP") approval. Such measures exceed what is permissible through the environmental review of THPs under the FPA. This conclusion is supported by the language and structure of the FPA, as well as its legislative history.

- **The Legislature's intent in the FPA is expressly stated, which only authorizes restoration of the productivity of timberlands**

The starting point in analyzing what is authorized by the FPA is to examine the language of the FPA:

> The applicable principles of statutory construction are well settled. 'In construing statutes, we must determine and effectuate legislative intent.' (*Woods v. Young* (1991) 53 Cal.3d 315, 323.) 'To ascertain intent, we look first to the words of the statutes' (*ibid*.), 'giving them their usual and ordinary meaning' (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601). If there is no ambiguity in the language of the statute, 'then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.' (*Kizer v. Hanna* (1989) 48 Cal.3d 1, 8.) 'Where the statute is clear, courts will not 'interpret away clear language in favor of an ambiguity that does not exist.'' (*Hartford Fire Ins. Co. v. Macri* (1992) 4 Cal.4th 318, 326.)

Lennane v. Franchise Tax Bd., 9 Cal. 4th 263, 268 (1994).

The plain language of the FPA states at Section 4513 that it is the intent of the Legislature "to assure that where feasible, *the productivity of timberlands is restored*, enhanced, and maintained." Cal. Pub. Res. Code § 4513(a) (Emphasis added.) No such provision regarding "restoration" exists with respect to other resources—rather, the FPA only calls for "consideration" to be given to other values such as recreation, watershed, wildlife, and other concerns. Cal. Pub. Res. Code § 4513(b). What such "consideration" entails is not open to interpretation; the FPA includes specific provisions on the rules that are to be promulgated to address these resources, beginning with Section 4551, and then individually identifying the resources in provisions such as Sections 4562.5 and 4562.7.

Section 4551 of the FPA calls for the promulgation of rules to address soil, air, fish and wildlife, and water resources. Notably, Section 4551 does not use any words such as "restore" or "improve," but it does mandate that the rules shall "assure the continuous growing and harvesting of commercial forest tree species." The absence of "restoration" is telling because a requirement to "restore" necessarily entails a requirement to do more than what may be required to mitigate for any potential impacts from a given THP; it entails a remedial or punitive purpose to go beyond the existing baseline conditions.

Moreover, in the Resource Conservation Standards of the FPA (Article 5, Sections 4561 et seq.), there is no mention of restoration—all of the resource-based rules address the application of preventative and maintenance measures in the context of active timber operations, not recovery. *See, e.g.*, § 4562.5 (calling for the "prevention, retardation, and control of accelerated soil erosion"), § 4562.7 (calling for the "control of timber operations" which may result in unreasonable effects of streams), § 4562.9 (calling for the "maintenance of installed drainage facilities and soil stabilization treatments"). In giving "consideration" to these resources, the FPA expressly prescribes what the rules should contain. For example, with respect to water resources, the FPA provides that rules shall be adopted "for control of timber operations which will result or threaten to result in unreasonable effects on the beneficial uses of the waters of the state." Cal. Pub. Res. Code § 4562.7. Nothing in this section expressly or impliedly authorizes the imposition of affirmative restoration measures. According to the statute, such rules are to include rules for product disposal, construction of stream crossings to avoid impairing water flow, minimizing damage to streamside vegetation, minimizing damage to streambeds, controlling slash and debris, and minimizing erosion effects. *Id.* at § 4562.7(a)-(f). None of these measures target restoration or impose recovery conditions on timber operations. Implying an authorization for such measures would be without any basis in the statute and exceed the authority of the Board.

None of the foregoing sections of the FPA expressly identifies a goal of restoration, or authorizes restoration, for other resources. The Legislature's intent, as expressly stated in Section 4513, only authorizes restoration for the productivity of timberlands. To interpret the statute otherwise would "create ambiguity that does not exist." *Hartford Fire Ins. Co.*, 4 Cal. 4th at 326.

- **Other provisions of the FPA confirm that restoration measures for resources other than the productivity of timberlands are not authorized**

A number of other provisions in the FPA further confirm that the Legislature did not intend to broadly authorize the imposition of restoration or recovery measures. For example, in the review of a THP, the Legislature has required responsible agencies to "provide the department with specific comments or recommendations, or both, on any significant environmental issues and proposed mitigation measures raised by the timber harvesting plan. The responsible agency shall also *identify its statutory authority for any requests for mitigation measures that it may determine to be necessary*." *Id*. at § 4582.6(b)(emphasis added). This requirement to specify statutory authority undermines any claim that agencies enjoy wide discretion to impose mitigation measures—much less recovery or restoration measures – through the THP review and approval process. The California Supreme Court has already explained that the FPA (and the California Environmental Quality Act ["CEQA"]) do not afford the

Department "unfettered discretion in the type of information it may require" when reviewing a THP. *Sierra Club v. State Bd. of Forestry*, 7 Cal. 4th 1215, 1234 (1994).

In reviewing what measures are not authorized by the FPA (or all other applicable law), the Attorney General's Office has also issued a relevant opinion. In a detailed analysis, the Attorney General concluded in a published opinion that a property owner cannot be required to submit a comprehensive flora and fauna survey of his property as a condition of a THP. Op. Cal. Atty Gen'l 95-902 (Sep. 1996). In reaching this conclusion, the Attorney General comprehensively evaluated the relevant provisions of the FPA discussed above, in addition to the general principles governing environmental review (including CEQA), and the Supreme Court's decision in *Sierra Club*. Ultimately, the Attorney General concluded that even an informational burden not authorized by the FPA could not be imposed on a timberland owner. Surely, then, the much more onerous burden represented by restoration or recovery measures could not be imposed on a landowner through the THP review and approval process.

As evidenced by Section 4582.6, the FPA requires specific statutory authority for the imposition of any measures as a condition of a THP. The Supreme Court and Attorney General are in accord that such statutory authorization is necessary. No specific statutory authority exists to impose restoration measures for anything except the productivity of timberlands.

- **The legislative history also confirms that restoration is limited only to the productivity of timberlands**

Even if the statutory language were not unambiguous and, therefore, controlling, the legislative history of the FPA confirms the limited agency discretion in imposing conditions on THPs. For example, in a competing bill to the FPA, AB 2346 from 1972, a proposed Section 4532.1 would have provided that regulations may include measures for "stand density control, soil erosion control, water quality and watershed control, *and amenity*." (Emphasis added.) In a Commentary included in Assemblyman Z'Berg's file, the reference to measures for "amenity" was described as the "heart of the bill"—and that such amenities, including "recreation, aesthetics, wildlife habitat, and the like. . . ," would be provided at the expense of the landowner.[1] However, the parallel provision ultimately adopted in the FPA, Section 4551.5, while broadly requiring the adoption of rules for the control and prevention of the impacts of timber operations in order to protect natural resources, omits any reference to "amenity." Given this careful parsing of language with respect to authorized measures, had the Legislature intended to include "restoration," they would have. The omission also speaks clearly to the Legislature's intent.

- **The FPA expressly acknowledges the constitutional limitations that prevent the imposition of conditions unrelated to a THP**

The reason that restoration and recovery are not broadly authorized by the FPA should not be surprising—such measures are inherently punitive. They require a project proponent to perform tasks that are designed to address conditions not caused by the project. The FPA recognizes the punitive nature of corrective work, authorizing such measures only for violations. Cal. Pub. Res. Code § 4608. Moreover, when such measures are imposed, the FPA affords all

[1] Capitol News Service, Affairs of State, Commentary by Phil Hanna (Aug. 30, 1972), from Assemblyman Z'Berg's file.

of the constitutional protections that are required for enforcement proceedings, including the provision of notice and the right to a public hearing before the Board of Forestry. *Id.* By imposing restoration requirements as part of a THP approval, these procedural protections would be circumvented and, in effect, strict liability would be imposed on THP applicants to enhance the existing baseline conditions on their property.

Finally, the FPA provides at Section 4512(d) that "[i]t is not the intent of the Legislature by the enactment of this chapter to take private property for public use without payment of just compensation in violation of the California and United States Constitutions." Measures that go beyond mitigating a THP's impacts, to require provision of environmental amenities, are necessarily imposing a public use on private property. Allowing for this additional overlay of regulatory burden in an attempt to provide environmental amenities on private timberlands would run afoul of the constitutional protections acknowledged in Section 4512(d). Both state and federal law require that a measure imposed by the government must "relate to the project at issue." *Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.*, 23 Cal.App.4th 1459, 1474 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) (requiring a nexus between conditions and the proposed project activity); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (requiring conditions to be roughly proportional—i.e., related in both nature and extent—to the proposed project activity). By their very nature, restorative measures go beyond mitigating project impacts and, thereby, lack the requisite nexus and proportionality.

In sum, requiring restoration or recovery measures other than for timberland productivity would exceed the Board's authority under the FPA. This conclusion is confirmed by the language and structure of the FPA, interpretive decisions, and the Act's legislative history.

Question 2: What is the meaning of "the productivity of timberlands?"

- **The FPA defines timberland productivity as a commercial activity**

Under the FPA, the term "timberland" is narrowly defined as land "which is available for, and capable of, growing a crop of trees of any commercial species used to produce lumber and other forest products, including Christmas trees." Cal. Pub. Res. Code § 4526. The term is notably defined by the land's potential commercial use for the production of lumber and other forest products. When coupled with the FPA's definition of "timber operations," the commercial nature of the FPA is unavoidable:

> "Timber operations" means the cutting or removal or both of timber or other solid wood forest products, including Christmas trees, from timberlands for commercial purposes. . . . 'Commercial purposes' includes: (1) The cutting or removal of trees which are processed into logs, lumber, or other wood products and offered for sale, barter, exchange, or trade, or; (2) The cutting or removal of trees or other forest products during the conversion of timberlands to land uses other than the growing of timber which are subject to the provisions of Section 4621, including, but not limited to, residential or commercial developments, production of other agricultural crops, recreational developments, ski

developments, water development projects, and transportation projects.

Id. at § 4527. These definitions are consistent with the stated intent and goals of the FPA to serve the public's need for timber and other forest products, and to assure that maximum sustained production of high-quality timber products is achieved. *Id*. at §§ 4512 & 4513.

- **Other laws confirm the commercial nature of timberland productivity**

To fully understand what the law means by the specific term "timberland productivity," an examination of the state's timber production mandate, as manifested in part through the timberland taxation provisions, is also useful.

- The California Constitution

The California Constitution speaks to the productivity of timberlands in calling for special tax treatment on lands with immature forest trees "planted on lands not previously bearing merchantable timber," or "planted or of natural growth on lands from which the merchantable original growth timber stand to the extent of 70 percent of all trees over 16 inches in diameter has been removed." Cal. Const., Art. XIII, § 3(j). The Constitution also vests the Legislature with the authority to adopt an alternative tax system, but requires that any such system "shall provide for exemption of unharvested immature trees, shall encourage the continued use of timberlands for the production of trees for timber products, and shall provide for restricting the use of timberland to the production of timber products and compatible uses with provisions for taxation of timberland based on the restrictions." *Id*. Accordingly, the California Constitution reflects a sovereign preference and encouragement for the use of timberlands to produce "timber products." Nowhere does the Constitution suggest that timberland productivity encompasses restoration or recovery of environmental amenities.

- The Timberland Productivity Act

In accord with Article 13 Section 3(j) of the California Constitution, the Legislature elected to establish a tax system for timberlands through its adoption of the Timberland Productivity Act (TPA). Specific to this analysis, the Legislature found and declared in the TPA that "[t]he state's increasing population threatens to erode the timberland base and diminish forest resource productivity through pressures to divert timberland to urban and other uses and through pressures to restrict or prohibit timber operations when viewed as being in conflict with nontimberland uses." Cal. Gov. Code § 51101(b). To address that concern, the Legislature declared it state policy to "[e]ncourage investment in timberlands based on reasonable expectation of harvest." *Id*. at § 51102(a)(4). More importantly, the TPA affords a stable and reliable regulatory framework that will not impose extraordinary measures—"[t]he Legislature further declares that it is the policy of this state that timber operations conducted in a manner consistent with forest practice rules adopted by the State Board of Forestry and Fire Protection shall not be or become restricted or prohibited due to any land use in or around the locality of those operations." *Id*. at § 51102(b); *see also id*. at § 51115.5(a) (declaring that timber operations in a timber production zone conducted pursuant to the FPA "shall not constitute a

nuisance, private or public"). The priority of timberland productivity—based on a reasonable expectation of harvest—is evident.

In language notably similar to the FPA, "timberland" is defined in the TPA as "privately owned land, or land acquired for state forest purposes, which is devoted to and used for growing and harvesting timber, or for growing and harvesting timber and compatible uses, and which is capable of growing an average annual volume of wood fiber of at least 15 cubic feet per acre." *Id*. at § 51104(f). Moreover, the TPA defines uses that are compatible with timberland as "any use which does not significantly detract from the use of the property for, or inhibit, growing and harvesting timber." *Id*. at § 51104(h). Through this definition, it is readily apparent that the growing and harvesting of timber has priority over any measures that would detract or inhibit such growth and harvest.

- The Revenue and Taxation Code

That productivity is the foremost goal is further evidenced by the Revenue and Taxation Code where the Legislature exempted trees used for forest products on timber production zone lands—such trees "on both privately and publicly owned lands shall be exempt from property taxation, including possessory interest taxation, and shall not be assessed for taxation purposes." Cal. Rev. & Tax Code § 436. That section further adds that only where production is not designated, then taxation may be based on timber's "aesthetic or amenity value," further supporting the proposition that it is timber production, not other considerations (including the provision of environmental amenities), that receives favored status under the law. *Id*.

To summarize, the FPA, and the related tax provisions found in the Constitution, the TPA, and the Revenue and Taxation Code, all demonstrate that timberland productivity is a well-defined term in California law that must be narrowly construed as the growing and harvesting of timber for lumber and other forest products.

Question 3: *The Forest Practice Act speaks of "giving consideration" to: i) natural resource values other than production of timber products (PRC 4513(b)), and ii) natural resource values and public needs other than timber and other forest products (PRC 4512(c)). Does the Forest Practice Act or any other statute constrain the weight that the Board of Forestry can give to these other needs and values when balancing them against the value of timber production?*

Yes. The FPA contains several provisions that illustrate the Legislature's intent that timber production outweighs other considerations.

- **The express policy and goal of the FPA establish that timber production outweighs other needs and values**

In section 4512(c), the Legislature declared it state policy "to encourage prudent and responsible forest resource management calculated to serve the public's need for timber and other forest products, while giving consideration to the public's need for watershed protection, fisheries and wildlife, and recreational opportunities alike in this and future generations." The words and structure of the section establish a definitive weight in favor of productivity, wherein

satisfying the "public's need for timber and other forest products" is the primary objective of management; within such management, other public needs are to be considered. The Legislature could have sought to "encourage" resource management calculated to serve all of the enumerated public needs, and not require that those other than "timber and other forest products" merely be "giv[en] consideration," but it did not.

In Section 4513 of the FPA, the Legislature declared its intent "to assure that: (a) where feasible, the productivity of timberlands is restored, enhanced, and maintained [, and] (b) the goal of maximum sustained production of high-quality timber products is achieved while giving consideration to values relating to recreation, watershed, wildlife, range and forage, fisheries, regional economic vitality, employment, and aesthetic enjoyment." This section further underscores and elaborates upon the priority given by the Legislature to management of timberlands to produce "timber and other forest products" (in section 4512(c)). In particular, the "productivity" that is the concern of section 4513 is quite clearly the productivity of trees, and not other resources that may be found on timberlands.

- **Other statutes and case law confirm that timberland productivity outweighs other considerations**

In a similar vein, the TPA speaks to compatible uses that shall not detract from or inhibit the growth and harvest of timber, as noted in the response to Question 2 above. All of the special tax treatment for timberland productivity (treatment not afforded to timberlands put to other uses) reflects the FPA's priority for production. And, the courts have also afforded the most weight to the timberland owner's interest in making productive use of his lands—"no individual member of the public and no local public entity can be deemed to have an interest in the question whether a landowner may harvest his or her own trees comparable to that of the landowner himself or herself." *Laupheimer v. State of California*, 200 Cal. App. 3d 440, 457 (1988).

All of the relevant authorities are in accord that the ability to grow and harvest timber on private timberland is the paramount interest that outweighs other considerations.

Question 4: *The Forest Practice Act recognizes: i) the value of forest resources, timberlands and other natural resources and the importance of using, maintaining, protecting and restoring them (PRC 4512(a), (b), and ii) the value of restoring, enhancing and maintaining timberland productivity (PRC 4513(a)). Does the Forest Practice Act or any other statute prohibit or constrain the Board of Forestry from promulgating Forest Practice Rules designed to improve consistency with the goals and requirements of those other State or Federal agencies that have the primary authority and responsibility for restoring or recovering other natural resource values (such as the quality and beneficial uses of water and fish species) where they are formally recognized as impaired, degraded, threatened or endangered?*

This question focuses on the ability of the Board of Forestry to adopt rules targeting restoration based on statutory authorities and responsibilities outside the FPA, primarily with respect to water quality and species related concerns.[2]

- **The Water Code expressly prohibits imposing specific restoration measures**

Specific to water resources, the agency with initial statutory responsibility is the designated regional water quality control board. The two primary vehicles that a regional water board has available to it in addressing proposed projects are waste discharge requirements and total maximum daily loads. Importantly, neither vehicle affords the regional water board with the power to impose specific restorative measures through project specifications. Rather, the Water Code expressly states that "[n]o waste discharge requirement or other order of a regional board or the state board or decree of a court issued under this division shall specify the design, location, type of construction, or particular manner in which compliance may be had with that requirement, order, or decree, and the person so ordered shall be permitted to comply with the order in any lawful manner." Cal. Water Code § 13360(a). The same analysis applies to TMDLs (a regulatory mechanism under the Clean Water Act) because implementation is delegated to the states under their existing state laws. Because the regional water board does not have authority under the Water Code to impose specific measures that prescribe a manner for compliance, it necessarily follows that the Board of Forestry may not rely on the Water Code for such authority in seeking to impose specific measures targeting restoration on THP applicants.

- **The Fish and Game Code severely constrains when and how recovery may be achieved**

With respect to species concerns, Division 3, Chapter 1.5 of the California Fish and Game Code governs the listing and oversight of endangered and threatened species in the state. The specific provisions for species recovery, found in Article 7, are limited and require that any strategy must include "an equitable apportionment of both public and private and regulatory and nonregulatory obligations." Cal. Fish & Game Code § 2111(d). Because this provision requires the "equitable" implementation of a variety of measures, and necessarily prohibits a unilateral imposition of the burdens of recovery solely on a private project proponent, the law understandably negates any possibility that such recovery strategies confer regulatory authority. Section 2114 states "[t]he recovery strategy itself shall have no regulatory significance [and] shall not be considered to be a regulation for any purpose." Again, the Board of Forestry may not rely on the Fish and Game Code for support or authority to impose recovery measures on THP applicants.

- **CEQA does not authorize restoration measures beyond existing baseline conditions**

Furthermore, the California Environmental Quality Act (CEQA) and its constraints on mitigation should be addressed. Under CEQA, a project's environmental effects "are determined by comparison with the existing 'baseline physical conditions'" and the analysis studies "the

[2] The terms "impaired, degraded, threatened or endangered" primarily arise in the context of water bodies and species.

adverse environmental impacts *of the proposed project*." *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings*, Case No. S138974, Slip Op. at 24 (June 2008) (*citing* Cal. Code Regs., tit. 14, § 15125, subd. (a); *County of Amador v. El Dorado County Water Agency*, 76 Cal. App. 4th 931, 952 (1999)) (emphasis in original). As the Guidelines explain, the Lead Agency "should normally limit its examination to changes in the existing physical conditions in the affected area as they exist at the time the notice of preparation is published, or . . . at the time environmental analysis is commenced." *Id.* at § 15126.2(a); *see also id*. at § 15125(a) (environmental setting describes conditions as they exist at the time of notice or when analysis is commenced). In looking at the proposed project, "[m]itigation measures are not required for effects which are not found to be significant." Cal. Code Regs., tit. 14, § 15126.4(a)(4). Moreover, such measures must be consistent with all applicable constitutional requirements, including that the measures "must be roughly proportional to *the impacts of the project*." *Id*. at § 15126.4(a)(4)(A) (emphasis added). Measures cannot be imposed if they are designed to address existing conditions because they do not relate to the impacts of the project. For this reason, restorative or recovery measures are not authorized because, by their very nature, such measures are designed to address conditions that exist with or without any project.

In sum, statutes other than the FPA cannot override the FPA's prohibitions and constraints on what may be imposed as a condition for approval of a THP. The Board cannot flout its statutory limits in the name of seeking to improve consistency with the goals of other agencies.

CONCLUSION

The FPA does not authorize the imposition of measures for the restoration or recovery of resources other than the productivity of timberlands. Indeed, the FPA precludes the imposition of such measures. This is not altered by the concept of "timberland productivity," which is limited to production of commercial timber and wood products. So too, the FPA's direction to give "consideration" to other natural resource values and public needs does not change the conclusion, as the FPA's text and structure indicate that timberland productivity outweighs those other values and that, in any event, giving "consideration" does not entail restoration or recovery. Finally, regardless of whether other agencies do or do not have independent authority under other statutes to impose restoration or recovery measures, the Board cannot lawfully implement such requirements for them.